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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

MELVIN GRIGLEY

Petitioner,

v.

THE CITY OF ATLANTA, GEORGIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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34pp

QUESTION PRESENTED

1. Whether a public employee asserting that the employer retaliated against the employee because the employee exercised First Amendment freedom of petition rights, as opposed to freedom of speech rights, must demonstrate that the employee's petition activity addressed a matter of public concern.

LIST OF PARTIES

The following party was plaintiff below and is a Petitioner before this Court: Melvin Grigley.

The following parties were defendants below and are Respondents before the Court: The City of Atlanta, Georgia; Beverly Harvard; S.M. O'Brien; Claire D'Agostino; Lou R. Moore; and Jimmy Martin. There is no parent or subsidiary company of any party listed.

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INTRODUCTION

Petitioner Melvin Grigley ("Grigley") respectfully prays that writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed March 4, 1998.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 136 F.3d 752 (11th Cir. 1998) and is reproduced in the Appendix to this Petition at 1a. The unreported decision of the United States District Court for the Northern District of Georgia (Cooper, J.) granting the motion for summary judgment is reproduced in the Appendix to this Petition at 11a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court of Appeals entered its judgment on March 4, 1998.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions of the First Amendment to the United States Constitution are set forth below:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Grigley filed his complaint on September 19, 1995. Jurisdiction was conferred on the United States District Court pursuant to 28 U.S.C. § 1331 and 1343. Grigley's complaint asserted that, *inter alia*, the City of Atlanta and the individual defendants violated his First Amendment right to freedom of petition by retaliating against him after he pursued criminal charges against a fellow police officer.[1] On February 19, 1997, the District Court granted the defendants' motion for summary judgment with respect to all of Grigley's claims. (Appendix 19a). Grigley filed his timely Notice of Appeal on March 22, 1997. On March 4, 1998, a panel of the Eleventh Circuit affirmed the District Court's finding and held that, like claims brought under the First Amendment free speech clause, Grigley must demonstrate that his petition activities touched on a matter of public concern. *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ based upon the reasons that the Eleventh Circuit Court of Appeals has decided an important question of constitutional law that has not been, but should be, settled by this Court. Further, the Eleventh Circuit has decided an important constitutional question in a way that conflicts directly with the Third Circuit Court of Appeals' decision in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994).

The Petitioner is Melvin Grigley. The relevant facts concerning Grigley's First Amendment freedom of petition claim are straightforward. Grigley is a male police officer employed

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[1] The remaining claims asserted in the complaint by Grigley are not subject to this petition for writ of certiorari.

as a Sergeant by the City of Atlanta Police Department. He is a 22-year veteran of that department. On May 31, 1993, Grigley was involved in a physical altercation at his home with Phyllis Hayes-Dix, a fellow City of Atlanta Police Officer. Both Grigley and Hayes-Dix were issued citations for disorderly conduct by police officers from the City of East Point. Grigley asserts that he was repeatedly encouraged to drop the charges against Hayes-Dix. He continually refused and subsequently testified against her at the criminal proceeding. Hayes-Dix was found guilty of the charges and fined, while Grigley was found not guilty.

Grigley contends that he was subjected to retaliation for pursuing the criminal charges against Hayes-Dix in the City of East Point. The retaliation consisted of various adverse actions that were subsequently taken against him by the City of Atlanta Police Department. Grigley filed suit against the City of Atlanta and various departmental officials. Grigley asserts that, in pursuing the criminal charges against Hayes-Dix, he was exercising his First Amendment right to freedom of petition and that the City of Atlanta retaliated against him because he exercised that constitutional right. The District Court and Court of Appeals held that in order to state a claim for retaliation under the First Amendment petition clause, Grigley must show that his petition activity touched on a matter of "public concern," as is required for retaliation cases brought under the First Amendment freedom of speech clause.

The single issue that Grigley is requesting that this Court review is whether the "public concern" requirement, announced by this Court in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) concerning freedom of speech cases, is applicable to cases brought under the petition clause of the First Amendment. Grigley asserts that because the interests protected by the petition clause are distinct from those

protected by the free speech clause, then the Eleventh Circuit erred in applying the "public concern" standard to his freedom of petition claim. This is an issue that has never been addressed by the Supreme Court and there is a split in the Circuit Courts of Appeals as to this issue.

In *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), the Third Circuit held that there are two distinct types activity which are protected under the First Amendment.[2] Citing *Connick v. Myers*, 103 S.Ct. 1684 (1983), the Third Circuit held that,

> [w]here the alleged retaliation is based on expressive conduct constituting speech, a court must first determine whether or not the speech can be fairly characterized as addressing a 'matter of public concern,' for a government employee who makes public complaints about problems not of 'public concern' has no first amendment immunity against employer discipline.

San Filippo, at p. 434. However, the Court held that an employee who's expressive conduct includes filing lawsuits and grievances has engaged in activity which implicates the petition clause and petition activity need not be on a matter of public concern to be protected. The Court held:

> we believe that there is an independent reason — a reason of constitutional dimension — to protect an employee lawsuit or grievance if it is of the sort that

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[2] The Supreme Court has recognized that the right to petition for the redress of grievances is protected by the First Amendment. *City of Dallas v. Stanglin*, 490 U.S. 19, 23, 109 S.Ct. 1591, 1594 (1989). The Court has further recognized that this right extends to citizens or groups that petition administrative agencies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

> constitutes a 'petition' within the meaning of the first amendment.
>
> The first amendment petition clause imposes on the United States an obligation for those who seek redress for perceived grievances. . . . [W]hen government — federal or state — formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purpose to hold that one who in good faith files an arguably meritorious 'petition' invoking that mechanism may be discipline for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur. . . . [W]hen one files a 'petition' one is not appealing over government's head to the general citizenry: when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or failed in its duty to repair."

San Filippo, at p. 442. There can be no doubt that an employee who decides, against his employer's demands, to pursue criminal charges against a fellow employee is acting to invoke his right to "petition the government for redress of grievances."[3]

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[3] The right of meaningful access to the courts is what separates civilized from uncivilized society:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . .

Chambers v. Baltimore and Ohio Railroad, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed 143 (1907).

Melvin Grigley has done exactly that. The First Amendment protects his right — as an individual acting to protect his individual physical well-being — to petition his government to criminally sanction a fellow employee who assaulted him. As the Court held in *San Filippo*, "the right to petition has a pedigree independent of — and substantially more ancient — than the freedoms of speech and press." *Id.*, at 443. The Court traced the petition clause's origin to 1689 and the Bill of Rights exacted of William and Mary, which itself prohibited "commitments and prosecutions" for exercising the right of petition. A reading of the First Amendment which removed the exercise of the right to petition from constitutional protection would be an unwarranted judicial demolition of one of the cornerstones of our freedoms.[4]

Where the right to access to courts is directly at issue, cases such as *San Filippo, supra*; *Harrison v. Springdale Water and Sewer Ass.*, 780 F.2d 1422 (8th Cir. 1986); *Stellmaker v. DePetrillo*, 710 F.Supp. 891 (D.Conn. 1989); *Fuchilla v. Prockop*, 682 F.Supp. 247 (D.N.J. 1987) and *McCoy v. Goldin*, 598 F.Supp. 310 (1984) are properly decided. These cases stand for the principal that when the violation of the petition clause concerns the right of access to the courts, there is no "public concern" requirement. In *McCoy* the Court stated that "[the public concern] limitation on speech, however, does not apply to the right of access to the courts, the central issue in this case. The right of access to the courts cannot be characterized in terms of "public concern." McCoy at 315 n.4.

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[4] See, Margo Pave, Comment, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees who File Legitimate Grievances and Lawsuits Against Their Government Employers*, 90 Nw. U. L. Rev. 304 (1995) for a detailed discussion of the historical development of the rights to petition and speech.

In *Harrison, supra*, that Court held that:

> It has been noted in this Circuit that "access to the courts is a fundamental right of every citizen." [cits.] an individual's constitutional right of access to the courts "cannot be impaired, either directly ... or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." *Sanders v. St. Louis County*, 724 F.2d 665 (8th Cir. 1983). The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. *See*, e.g., *id.*; *Garland v. Polley*, 594 F.2d at 1223; *Hall v. Sutton*, 755 F.2d 786, 787 (11th Cir. 1985); *Matzker v. Herr*, 748 F.2d 1142, 1150-51 (7th Cir. 1984) ... An individual is entitled to "free and unhampered access to the courts."

Harrison at 1427-1428. These cases have recognized that in petition cases it is the right of access that is protected.

The issue of whether the freedom of speech "public concern" standard for First Amendment public employee retaliation cases should be applied to freedom of petition cases should be reviewed by this Court because it is an important constitutional right and there is a conflict in the Circuit Courts of Appeals as to the issue. In contrast to the decision in *San Filippo*, a majority of circuits have determined that the "public concern" requirement applies to First Amendment retaliation claims based upon the right to petition. *Valot v. Southeast Local*

School District Board of Education, 107 F.3d 1220, 1226 (6th Cir. 1997); *White Plains Powing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffman v. Mayor, Councilmen and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); and *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985). These decisions, as well as the Eleventh Circuit decision in Grigley's case, are wrongly decided and are not persuasive. Indeed, *Valot, White Plains*, and *Schalk* all held, without any discussion, that the public concern requirement applied to petition cases. They simply cited to decisions of other Circuit Courts and chose to adopt their holdings. The Third Circuit's decision in *San Filippo* is more persuasive and correctly recognizes the historical distinction between the right of access interests protected by the petition clause and the speech interests protected by the speech clause.

CONCLUSION

A decision on this issue is of high constitutional importance. The *San Filippo* standard is the correct approach for analyzing public employee claims of retaliation for the exercise of their constitutional right to petition. This standard acknowledges the distinct power and reach of the petition clause. The extraordinary implications of the Eleventh Circuit's gloss on an important constitutional right, never before decided by this Court, that conflicts with the Third Circuit's well reasoned opinion in *San Filippo*, demand that this Court exercise its supervisory powers and issue the writ to review and resolve this conflict.

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APPENDIX A

MELVIN GRIGLEY, Plaintiff-Appellant,

vs.

THE CITY OF ATLANTA; Beverly Harvard, in her official capacity as Police Chief of City of Atlanta; S.M. O'Brien, individually and in her official capacity as Major in the City of Atlanta Police Department; Claire D'Agostino, individually and in her official capacity as Psychologist employed by the City of Atlanta; Lou R. Moore, individually and in his official capacity as Sergeant in the City of Atlanta Police Department; Jimmy Martin, individually and in his official capacity as Sergeant in the City of Atlanta Police Department, Defendants-Appellees;

NO. 97-8268

United States Court of Appeals,
Eleventh Circuit

March 4, 1998

Police officer brought civil rights action against city and its agents, alleging he was retaliated against for exercising his First Amendment right to petition. The United States District Court for the Northern District of Georgia, No. 1:95-2351-CC, Clarence Cooper, J., granted city's motion for summary judgment and officer appealed. The Court of Appeals, Black, Circuit Judge, addressing an issue of first impression, held that public employee's claims of retaliation in violation of First Amendment right to petition is subject to public concern requirement.

Affirmed.

1. Constitutional Law 91

"Public concern" requirement applies to First Amendment right to petition claims. U.S.C.A. Const.Amend.1.

2. Constitutional Law 90.1(7.2)

Claims by public employees of retaliation in violation of First Amendment right to free speech are analyzed in four steps: first, court makes threshold determination of whether employee's speech may be fairly characterized as constituting speech on matter of public concern; second court balances employee's First Amendment interests against interest of state, as employer, in promoting efficiency of public services it performs through its employees; third, if court finds that employee has satisfied first two requirements, fact-finder determines whether employee's protected speech played substantial part in adverse employment decision; fourth, state must prove by preponderance of evidence that it would have reached same decision even in absence of protected conduct. U.S.C.A. Const.Amend.1.

3. Constitutional Law 91
Municipal Corporations 185(1)

City police officer's claim that he was retaliated against for exercising his First Amendment right to petition when he was subjected to disciplinary actions after he testified against fellow officer in criminal case was subject to requirement that petition relate to matter of public concern. U.S.C.A. Const.Amend.1.

4. Constitutional Law 91

Public employee's claim of retaliation in violation of First Amendment right to petition is subject to public concern requirement; accordingly, where public employee's petition does not address matter of public concern, judicial inquiry should end, and no specific balancing of interests is necessary. U.S.C.A. Const.Amend.1.

Harlan Stuart Miller, III, David C. Ates, Atlanta, Ga, for Plaintiff-Appellant.

Mary Huber, Rolesia D. Butler, Officer of City Attorney, Atlanta, Ga, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK and BARKETT, Circuit, Judges, and PROPST[5], Senior District Judge.

BLACK, Circuit Judge:

[1] Appellant Melvin Grigley (Grigley) brought this action against the City of Atlanta and its agents pursuant to 42 U.S.C. § 1983, alleging that he was retaliated against in violation of his First Amendment right to petition. The district court granted the Appellee's motion for summary judgment, ruling that Grigley's expression was not protected by the First Amendment because it did not relate to a matter of public concern. We hold the "public concern" requirement applies to First Amendment right of petition claims.

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[5] Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

I. BACKGROUND

Grigley is a male police officer employed as a Sergeant by the City of Atlanta Police Department. He is a 22-year veteran of that department. On May 31, 1993, Grigley was involved in a physical altercation at his home with Officer Phyllis Hayes-Dix, a female Atlanta police officer. The fight resulted form a dispute regarding the paternity of Hayes-Dix's son. City of East Point police officers were called to the scene and issued citations for disorderly conduct to Grigley and Hayes-Dix. Grigley alleges that although he was "repeatedly encouraged" to "drop" the charges against Hayes-Dix, he nevertheless testified against her. Hayes-Dix was found guilty of the charges and fined, while Grigley was found not guilty.[6]

Grigley contends that he was subjected to retaliation for pursuing the criminal charges against Hayes-Dix. The alleged retaliation consisted of disciplinary actions taken against him in connection with two other incidents. In November 1993, Grigley was involved in a physical altercation at his home with Karen Jackson, the mother of his daughter. Although he explained that he had been attacked by Jackson, the City of Atlanta Police Department's Office of Professional Standards (OPS) imposed a one-day suspension on Grigley, which was overturned on appeal. He was referred to the City's Psychological Services Unit (PSU) for an Early Warning Evaluation. On March 1, 1994, Grigley was involved in a traffic accident in

[6] The city of Atlanta Police Department's Office of Professional Standards (OPS) conducted an investigation of the incident between Grigley and Hayes-Dix and recommended that both officers be charged with violating departmental work rules. The final disciplinary authority determined that Grigley would not be disciplined and that Hayes-Dix would received a two-day suspension.

which his vehicle collided with a vehicle driven by Jackson. He asserts that his vehicle accidently hydroplaned into Jackson's vehicle. Grigley alleges that he was taken to the OPS offices against his will and was required to take a drug test. He also was required to return to PSU and to attend counseling and domestic violence prevention classes. Grigley asserts that he was not at fault in either of the incidents and that the actions taken against him were in retaliation for his refusal to drop the charges against Hayes-Dix.

The district court granted summary judgment against Grigley on his First Amendment claim, holding that Grigley's testimony against Hayes-Dix could not be characterized as speech on a matter of public concern. This appeal followed.[7]

II. DISCUSSION

[2] Claims by public employees of retaliation in violation of the First Amendment right to freedom of speech are analyzed in four steps. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989). First, the court makes the threshold determination of "whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern.'" *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896-97, 97 L.Ed.2d 315(1987)). Second, if the court determines that the speech addresses a

[7] In his complaint, Grigley alleged various other federal constitutional and state law claims. The district court granted the Appellees' motion for summary judgment on all counts. Grigley raised the following issues on appeal: (1) whether the district court erred in granting summary judgment against Grigley on his Equal Protection claim of gender discrimination; (2) whether the individually named defendants are entitled to qualified immunity from the federal claims; (3) whether the individually named defendants are immune from the state law claims; and (4) whether the district court erred in granted summary judgment to the City of Atlanta on Grigley's claims brought pursuant to 42 U.S.C. § 1983. These issues do not warrant discussion. We affirm the district court.

matter of public concern, the court balances the employee's First Amendment interests against "'the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees.'" *Id.* (quoting *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968)). Third, if the court finds that the employee has satisfied the first two requirements, the fact-finder determines whether the employee's protected speech played a substantial part in the adverse employment decision. *Id.* Fourth, if the employee has prevailed on each of the previous three requirements, the state must prove by a preponderance of the evidence that "'it would have reached the same decision ... even in the absence of the protected conduct.'" *Id.* at 1566 (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)).

[3] The district court dismissed Grigley's claim at the first step of this analysis, ruling that Grigley's speech did not involve a matter of public concern. Grigley does not contest the district court's finding that the charges and testimony against Hayes-Dix did not involve a matter of public concern. Grigley argues instead that the district court failed to distinguish his right to petition claim from the freedom of speech claims at issue in this Circuit's prior case law. Specifically, Grigley asserts that the public concern requirement is not applicable to a right to petition claim.

The majority of circuits that have considered whether the public concern requirement applies to First Amendment retaliation claims based on the right to petition have determined that it does apply to such claims. *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1226, (6th Cir.1997), *cert.denied*, ____U.S.____, 118 S.Ct. 164, ____L.Ed.2d____ (1997); *White Plains Towing Corp v. Patterson*, 991 F.2d 1049, 1059 (2d Cir.1993); *Hoffman v. Mayor, Councilmen and Citizens*

of Liberty, 905 F.2d 229, 233 (8th Cir.1990); *Schalk v. Gallenmore*, 906, F.2d 491, 498 (10th Cir.1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir.1988); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir.1985). Grigley asks that we adopt the minority position announced by the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir.1994), holding that there is no public concern requirement for Petition Clause claims[8].

The issue has not been addressed specifically by this Circuit. We have had cases factually similar to the present case that were brought as freedom of speech claims but could have ben framed as right to petition claims. In those cases, we did note distinguish between First Amendment retaliation claims based on freedom on speech and those based on the right to petition.[9] For example, *Morgan v. Ford*, 6 F.3d 750 (11th

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[8] Although we do not find the reasoning of Bongiovanni to be persuasive, it is not clear that Bongiovanni repudiates the public concern requirement where the government employer "formally adopts a mechanism for redress of those grievances for which government is allegedly accountable," reasoning that "when one files a 'petition' on is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." 30 F.3d at 442. Grigley's claim can be distinguished for two reasons: (1) Grigley did not file any sort of claim or grievance at all but merely testified against a female co-worker and refused to "drop" charges against that co-worker; and (2) Grigley did not seek to redress any adverse action taken by the government employer against him. The holding in Bongiovanni focuses on the relationship between the government employer and the employee and seeks to vindicate the right of the employee to pursue the employer's formal grievance process. The facts of the present case do not fall within that framework.

[9] *See, e.g., Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1529-30 (11th Cir. 1997) (rejecting claim of retaliatory discrimination because disabled employee's filing of state ante litem claim as a prerequisite to bringing a legal action against the City for discrimination did not constitute speech on a matter of public concern); *Watkins v. Bowden*, 105 F.3d 1344, 1352-54 (11th Cir.1997) (rejecting claim of retaliatory termination based on employee's complaints of harassment, explaining that 'if Watkins's com-

Cir.1993), the case relied on by the district court, involved a grievance filed against a government employer, and is facts therefore would have supported a right of petition claim.[10] We concluded that "[a]s an employee grievance, Morgan's speech was not a matter of public concern," and "[s]ummary judgment on Morgan's section 1983 claim was therefore appropriate." *Id.* at 755.

The public concern requirement has its origins in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *Connick* involved a claim by a government employee that she was terminated in retaliation for circulating a questionnaire critical of employment conditions. The Supreme Court concluded that although public employees do have some First Amendment interest in speech that does not involve a matter of public concern, that interest is categorically outweighed by the employer's interest in the efficient functioning of the workplace:

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reason for her discharge. . .

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plaint did not affect a matter of public concern, her First Amendment claims must fail"); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.1984) (rejecting retaliatory nonrehiring claim of teacher who had filed a grievance with the Superintendent of Education, stating that "plaintiff's grievance is protected under the First Amendment only if it related to a matter of public concern").

[10] The employee's speech at issue in Morgan consisted of "complaints to official bodies-the Superintendent of the ACMI, Internal Affairs, and the office of Fair Employment practices." 6 F.3d at 755. This court held that "Morgan primarily spoke as an employee in order to improve her work environment... [T]he main thrust of her speech took the form of a private employee grievance." *Id.*

> . . . [W[hen a public employee speaks not as a citizen upon matter of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

id. at 146-47, 103 S.Ct. at 1690.

The public concern requirement exists because that category of expression is at the core of the First Amendment's protection: "our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." Id. at 154, 103 S.Ct. at 1694. Thus, the employer's interest in the efficient functioning of the work place is potentially overridden only where the employee's speech implicates the central value of the First Amendment by addressing a matter of public concern.

The rationale of *Connick* applies to expression that takes the form of a petition as well as expression that takes the form of speech. The Petition Clause is not entitled to any greater protection than the Free Speech Clause:

> The Petition Clause ... was inspired by the same ideal of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the president than other First Amendment expressions.

McDonald v. Smith, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791,

86 L.Ed.2d 384 (1985) (citations omitted.) The distinction urged by Grigley between retaliation claims based on freedom of speech and those based on the right to petition was not envisioned in *Connick*:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public official should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Connick, 461 U.S. at 149, 103 S.Ct. at 1691.

[4] We hold that a public employee's claim of retaliation in violation of the First Amendment right to petition is subject tot the public concern requirement. Accordingly, where a public employee's petition does not address a matter of public concern, the judicial inquiry should end at the first of the four steps outlined in Bryson, and no specific balancing of interests is necessary.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MELVIN GRIGLEY,	:	
	:	
Plaintiff	:	Civil Action File No.
v.	:	1:95-CV-2351-CC
	:	
CITY OF ATLANTA; et al	:	
	:	
Defendants.	:	

ORDER

Plaintiff brings this action for damages pursuant to 42 U.S.C. § 1983. Plaintiff also asserts various state law causes of action. Pending before the court are Defendants' Motion for Summary Judgment [9-1] and Defendants' Motion to File Brief in Excess of Page Limit [12-1]. Defendants' Motion to File Brief in Excess of Page Limit is GRANTED.

I. FACTS

Plaintiff, is a male employee of the City of Atlanta Police Department. On May 31, 1993, plaintiff was involved in a fight with a female Atlanta police officer, Phyllis Hayes-Dix. The fight resulted from a dispute about the paternity of a child born to plaintiff and Officer Hayes-Dix. Officers from the City of East Point Police Department responded to the call and issued citations for disorderly conduct to plaintiff and Officer Hayes-Dix. At a hearing on the charges, plaintiff was found not guilty; Officer Hayes-Dix was found guilty and fined.

The City of Atlanta Police Department's Office of Professional Standards ("OPS") investigated the incident and recom-

mended that both officers be charged with violating employee work rules; however, the final disciplinary authority decided that plaintiff should not be disciplined and Officer Hayes-Dix should receive a two day suspension. Officer Hayes-Dix was also required to submit to a psychological evaluation regrading the incident.

In November 1993, Plaintiff was involved in a physical altercation with Karen Jackson, the mother of plaintiff's daughter. The incident was reported by Ms. Jackson's sister, who told the police that Ms. Jackson was at the hospital being treated for serious injuries she received in a fight with plaintiff. OPS went to the hospital to interview Ms. Jackson, who had numerous scratches, a black eye and chest soreness from being kicked in the chest by plaintiff. Plaintiff told OPS that Ms. Jackson was injured when plaintiff attempted to disarm her after she threatened plaintiff with a knife. OPS charged plaintiff with bringing discredit on the department, and plaintiff received a one day suspension. The suspension was subsequently overturned by the Atlanta Civil Service Board. In December 1993, plaintiff was required to report to psychological services for an early warning review.

On March 1, 1994, plaintiff was involved in a car accident with Ms. Jackson. Ms. Jackson told OPS investigators Moore and Martin that plaintiff deliberately rammed his car into hers. Officers Moore and Martin asked plaintiff to come to OPS to make a statement. After a preliminary investigation, Officers Moore and Martin suspected that plaintiff was under the influence of an illegal substance and ordered plaintiff to submit a substance abuse test. Plaintiff was relieved of his duties pending the results of the drug test. The test results revealed the presence of codeine. Plaintiff subsequently verified that he had a prescription for medicine containing codeine. OPS recommended that plaintiff seek counseling from an outside

program paid for by the City of Atlanta, and plaintiff's deputy chief ordered him to attend the program.

II. STANDARD OF REVIEW

The court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions to file, together with the affidavits, if any, show that there is not genuine issue as to any material fat and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard mirrors the standard for judgment as a matter of law under Fed. R. Civ. P. 50(a), which requires the trial court to enter judgment as a matter of law if there can be but one reasonable conclusion as to the verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249, 106 S.Ct. at 2510-11.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its favor. *Id.* at 250, 106 S.Ct. at 2511. The nonmoving party, however, cannot rest upon mere denials or allegations in the pleadings. Nor may the nonmoving party simply argue facts supporting its claim will be developed later or at trial. Rather the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of [f]act [sic] for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. *See Anderson*, 477 U.S. at 250-51, 106 S.Ct. at 2511-12. If a plaintiff fails to support an essential element of a claim, however, summary judgment

must issue because a complete failure of proof regarding an essential element renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

III. DISCUSSION

A. *Plaintiff's § 1983 Claims against City of Atlanta and Defendants in their Official Capacities*[11]

A local government is liable under § '1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). A municipal government may not be held liable on the basis of respondeat superior, but liability may only be imposed for deprivations undertaken pursuant to governmental custom or policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). A "municipal act" is not limited to a decision made by the city's official legislative body or in written agreement. A municipal policy can also be implicated by pervasive city custom. *Mandel v. Doe*, 888 F.2d 783, 791 (11th Cir. 1989). Furthermore, municipal liability may attach to a single decision of a government official who is the final policymaker for the municipality. *Id* at 783.

Plaintiff alleges in his complaint that defendants discriminated against him on the basis of his sex in violation of the Fourteenth Amendment; that he was retailed against in violation of the First Amendment; and that he was arrested in violation of the Fourth Amendment. Plaintiff further alleges the

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[11] Since suits against municipal employees acting in their official capacities are in actuality suits against the municipality, see *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991), these claims will be addressed together.

facts complained of were accomplished pursuant to the official policy and custom of the City of Atlanta. Defendants contend that plaintiff cannot establish either the existence of a municipal policy, custom or practice which would support a finding of municipal liability or that the city official who issued the final decisions in each of the challenged acts were the final policymakers for the city.

The City of Atlanta charter sets out an official policy of non-discrimination as well as an express policy of non-interference with an individual's right to freedom of speech. Also, the City of Atlanta Field Manual at section 6.1.2 sets forth the appropriate procedures to be followed by officers who make arrests without a warrant. Plaintiff has failed to show that the City of Atlanta has formally adopted policies which violate plaintiff's constitutional rights. Similarly, plaintiff has failed to establish a widespread practice that, "although not authorized by written law or express municipal policy, is 'so permanent and will settled as to constitute a custom or usage' with the force of law." *St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988).

Plaintiff also argues that since Chief of Police Beverly Harvard made final hiring decisions within the police department, her decisions created city policy. Plaintiff also argues that Major O'Brien made decisions regarding drug testing and is a final policy maker in the area of drug testing. Plaintiff fails to distinguish between a "decision maker" and a "policy maker," a distinction critical to the imposition of municipal liability. *See Praprotnik*, 485 U.S. at 927. Although the Chief Harvard may have decision making authority over personnel decisions, she does not set the City's employment policies. These policies are [s]et [sic] by the City Council and approved by the Mayor. Similarly, while Major O'Brien may make decisions regarding drug testing, she does not set the City's Substance Abuse

Policy and department training on Fourth Amendment issues. The court finds that plaintiff has failed to establish that any of the acts complained of in the complaint were taken pursuant to an official municipal policy. Accordingly, the court concludes that the City of Atlanta and all defendants named in their official capacities are entitled to summary judgment.

B. *Plaintiff's State Law Claims against City of Atlanta*

O.C.G.A. § 36-33-1 provides that a municipal corporation shall not be liable for failure to perform or errors in performing governmental functions. The question of liability depends on whether at the time of the injury sued for the municipality was engaged in governmental or ministerial duty. *Roberts v. Mayor of Savannah*, 54 Ga. App. 375, 188 S.E. 39 (1936). Plaintiff contests certain actions taken by the Police Department and the Psychological Services Unit of the Personnel Department. The operation of a police department is clearly a government function. See *Peoples v. City of Atlanta*, 189 Ga. App. 888, 377 S.E. 2d 889 (1989). Also, since the operation of the Psychological Services Unit is primarily for the benefit of the public and not for the generation of revenue, it is a governmental function. See *City of Atlanta v. Chambers*, 205 Ga. App. 834, 836, 424 S.E.2d 19 (1992). Consequently, pursuant to O.C.G.A. § 36-33-1, the City is entitled to immunity on plaintiff's state law claims.

C. *Plaintiff's State Law Claims against Remaining Defendants*

The court finds that the remaining defendants are also entitled to immunity as to plaintiff's state law claims. When a governmental officer performs discretionary acts, he or she has immunity from liability to persons who may be injured as a result of an erroneous decision; provided that the acts complained of are done within the scope of the officer's authority

and are performed without willfulness, malice or corruption. *McDay v. City of Atlanta*, 204 Ga. App. 621, 420 S.E.2d 75 (1992). The court finds that each of the defendants had the authority to exercise their discretion in the various matters involved in this case. The court also finds that plaintiff has pointed to evidence that any of the defendants acted with wilfulness, malice or corruption, therefore, defendants are immune from liability as to plaintiff's state law claims. *Kennedy v. Johnson*, 205 Ga. App. 220, 222, 421 S.E.2d 746 (1992).

D. *Plaintiff's First Amendment Claims against Defendants*

Plaintiff contends that defendants retaliated against him for his participation in criminal proceedings brought against Officer Hayes-Dix and that those actions violated his First Amendment rights to freedom of speech and petition for redress of grievances. The court finds that plaintiff's testimony against Officer Hayes-Dix in the Municipal Court of the City of East Point does not constitute speech on a matter of public concern. Plaintiff's speech was driven by his personal interest in prosecuting Officer Hayes-Dix for their altercation of May 31, 1993. Since plaintiff's speech cannot be "fairly characterized as constituting speech on a matter of public concern," defendants are entitled to summary judgment on plaintiff's First Amendment claims. See *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993).

E. *Plaintiff's § 1983 claims against Defendants in their Individual Capacities*

Government officials are entitled to qualified immunity unless he or she violates a clearly established right of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1981). The defendant must first prove that he was acting within the scope of this discretionary authority and then the

burden shifts to the plaintiff to prove that the defendant's conduct violated clearly established law. *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988), quoting *Ziegler v. Jackson*, 716 F.2d 847 (11th Cir. 1983).

The undisputed facts show that all of the defendants were acting in a discretionary capacity in the performance of their job duties. Plaintiff has failed to set forth any evidence that defendants engaged in intentional sex discrimination. Moreover, plaintiff has failed to establish a genuine issue of material fact as to whether defendants' conduct violated any clearly established constitutional law. Consequently, defendants are entitled to qualified immunity on plaintiff's § 1983 claims.

The court also finds that defendants are entitled to summary judgment on the substance of plaintiff's equal protection claims. Plaintiff has put forth no evidence that the discipline he received for his participation in the May 31 altercation was more severe than the discipline Officer Hayes-Dix received. Since plaintiff cannot show an intent to discriminate, plaintiff equal protection claim must fail. *See Chaney v. Southern Ray Co.*, 847 F.2d 718 (11th Cir. 1988).

F. *Plaintiff's Claims which are barred by the Statute of Limitations.*

Plaintiff filed this action on September 20, 1995. The statutory limitations period for claims brought pursuant to 42 U.S.C. § 1983 is two years. O.C.G.A. § 9-3-33; *Williams v. Garcia*, 471 U.S. 261, 276-77, 105 S.Ct. 1938, 1947-48, 85 L.Ed.2d 254 (1985). Defendants are entitled to summary judgment on all causes of action which accrued before September 20, 1983. Also, the Georgia statute of limitations for libel and slander is one year. O.C.G.A. § 9-3-33. Defendants are entitled to summary judgment for any defamatory statements

which were made prior to September 20, 1994.

For the foregoing reasons, Defendants' Motion for Summary Judgment [9-1] is GRANTED in its entirety and the case is DISMISSED.

CONCLUSION

Defendants Motion for Summary Judgment [9-1] is GRANTED. Defendants Motion to File Brief in Excess of Page Limit [12-1] is GRANTED.

SO ORDERED this 19th day of February, 1997.